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Case No. _____

IN THE SUPREME COURT
OF THE UNITED STATES
October Term 1980

ALABAMA DAIRY COMMISSION AND ASSOCIATED MILK PRODUCERS, INC.,

Petitioners

vs.

DELVIEW MEADOW GOLD DIVISION, BEATRICE FOODS COMPANY, et al.,

Respondents

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

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APPENDIX "A"

REPRINTED FROM DELVIEW MEADOW, ETC. v. ALA. DAIRY COM'N
Ala., 383 So.2d 511

DELVIEW MEADOW GOLD DIVISION
BEATRICE FOODS COMPANY et al.

v.

ALABAMA DAIRY COMMISSION and
Associated Milk Producers, Inc.

SC 2716.

Supreme Court of Alabama.

June 30, 1978.

Rehearing Denied Aug. 4, 1978.

After Remand Sept. 28, 1979

Rehearing Denied May 9, 1980

[383 So.2d 511]

On review of an order of the Alabama Dairy Commission, the Circuit Court, Montgomery County, William Thetford, J., invalidated buttermilk regulation, and appeal was taken. The Supreme Court, 345 So.2d 278, held that buttermilk regulation was valid, and reversed and remanded. The Circuit Court denied milk distributors' post-judgment motions, and distributors appealed. The Supreme Court held that: (1) it would

not consider two additional constitutional contentions for the first time on appeal, but (2) cause would be remanded for consideration of merits of distributors' due process claims. On remand, the Circuit Court, Sam Taylor, J., held that buttermilk regulation did not violate due process, and milk producers again appealed. The Supreme Court, Faulkner, J., held that buttermilk regulation, which required milk distributor who sold buttermilk made from milk powder to pay for equivalent portions of surplus milk he received from farmer-producer just as if such surplus milk had been used in making buttermilk, deprived milk distributors of their property in arbitrary and unreasonable manner in violation of due process of law.

Reversed and rendered.

Maddox, J., filed a dissenting opinion in which Shores and Beatty, JJ., joined, and Embry, J., dissented from the Supreme Court's decision to remand case for consideration of the due process claim.

Shores, J., filed an opinion concurring in the result on the merits of the due process claim in which Beatty, J., joined.

Maddox, J., filed an opinion dissenting on the merits of the due process claim in

which Embry, J., joined.

[Headnote deleted]

[383 So.2d 512]

PER CURIAM.

This is an appeal by Delview Meadow Gold Division Beatrice Foods Company and others (hereinafter referred to as Distributors) involving Order 2-76 of the Alabama Dairy Commission. The order was previously declared valid by this court in "Alabama Dairy Commission v. Delview Meadow Gold Division, Beatrice Foods Company, et al.", 345 So.2d 278 (Ala. 1977).

Under current regulations promulgated by the Dairy Commission, milk producers are paid a Class I price by milk distributors for that portion of milk sold by the distributors for consumption as fluid milk. A much lower Class II price is paid for other milk purchased from the producers which is usually used in making cheese and other milk products. Order 2-76 changes this classification and pricing structure for buttermilk which is made from milk powder rather than fluid milk.

In making buttermilk, distributors may choose to use either fluid milk or cheaper milk powder. However, under the provi-

sions of Order 2-76, if a distributor receives surplus fluid milk from a producer and the distributor then manufactures and sells buttermilk made from milk powder, he must pay the producer for an equivalent portion of the producer's otherwise surplus milk at the Class I price "as though" such fluid milk had been used in making the buttermilk.

Order 2-76 further provides that distributors may pass increased costs resulting from the regulation on to consumers through an increase in the wholesale price of buttermilk.

The Dairy Commission enacted Order 2-76 on January 16, 1976. On February 9, 1976 the Distributors filed a timely petition for writ of certiorari in the Montgomery County Circuit Court seeking a review of the new regulation. It was alleged that Order 2-76 was invalid and violative of the Due Process Clause of both the state and federal constitutions.

On February 23, 1976 the trial court entered an order suspending the operation of Order 2-76 pending a final determination on its validity. The order further required the Distributors to monthly pay into an

escrow fund an amount equal to the difference between what was actually paid to producers and what would have been paid to them if Order 2-76 were in effect.

On April 7, 1976 the Montgomery County Circuit Court declared Order 2-76 invalid as being beyond the powers of the Dairy Commission. The decree was based upon this court's decision in "Dark's Dairy v. Alabama State Milk Control Board", 278 Ala. 693, 180 So.2d 527 (1965). The Dairy Commission then appealed the circuit court's ruling to this court.

On appeal the Distributors asserted that "Dark's Dairy" was controlling. They further argued the previously asserted "due process" claim as well as alleged violations of the Commerce Clause of the federal constitution and of the "equal protection" provisions of both the state and federal constitutions.

On April 15, 1977 a majority of this court reversed the circuit court's order, holding that "Dark's Dairy" was not controlling, and reversed and remanded the cause. This court did not address the asserted "due process" or "commerce clause" or "equal protection" claims in that opinion. These various constitutional challenges were once

again raised in the Distributors' application for rehearing which was denied on May 20, 1977.

The Distributors thereafter filed the following motions in Montgomery County Circuit Court: motion to set case for hearing on constitutional questions; motion to remand to the Dairy Commission; and motion to refund escrow fund (to the Distributors) or, in the alternative, motion to hold entire escrow fund intact pending completion of all judicial proceedings. In addition to these various motions, the Distributors filed an amendment to their original petition for certiorari which once again raised "due process," "commerce clause," and "equal protection" claims.

All motions and the amendment were denied by the trial court on June 16, 1977, and the escrow funds were disbursed. Notice of appeal to this court was filed by the Distributors from the June 16, 1977, order. A motion for summary dismissal was subsequently filed by the Dairy Commission on the grounds that the issues raised on this appeal were before the court in the prior appeal involving Order 2-76. The cause was thus submitted on the motion and the merits.

Briefly stated, the Distributors make

the following contentions on this appeal:

(1) Order 2-76 places a substantial burden on interstate trade of milk powder in violation of the Commerce Clause of the federal constitution;

(2) Order 2-76 violates the Distributors' rights under the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the federal constitution and similar provisions of the state constitution; and

(3) The June 28, 1976, trial court order was without jurisdiction to make any decree af-

[383 So.2d 514]

fecting the rights of the parties and was therefore null and void.

Title 22, section 226, Code of Alabama 1940 (§2 13 63, Code 1975), establishes the procedure for review of Dairy Commission orders. This statute provides in pertinent part as follows:

> "§226. Certiorari to review.- Any person affected by any order or action of the board, who deems himself aggrieved by any such order or act may within ten days after receiving notice of any such action or order, have such order, or action reviewed by a writ of certiorari by filing in the circuit court of the county wherein said action or order

> was taken or made, a verified petition setting out the specific order or action, or any part or parts thereof whereby said person deems himself aggrieved, and such court shall only consider such matters as contained in the petition. . . . [N]o new or additional evidence shall be taken or heard by the court. . . . Upon final hearing, such court shall have jurisdiction to reverse, vacate or modify the order complained of, if upon consideration of the issues before the court, the court is of the opinion the order is unlawful or unreasonable."

Under the clear wording of this statute, review by the circuit court of orders of the Dairy Commission must be limited to a consideration of the evidence presented in the hearing before the Dairy Commission and the issues contained in the petition for certiorari. No similar provision is made in Title 22, section 226, nor in any other statute specifically relating to the Dairy Commission, concerning review by this court of circuit court judgments. However, we have stated that on appeal of Dairy Commission actions this court is governed by the same rules of review as was the circuit court.

"White Way Pure Milk Company v. Alabama State Milk Control Board", 265 Ala. 660, 93 So.2d 509 (1957). Thus, in the present appeal, this court may only consider evidence placed in the first instance upon the record developed before the Dairy Commission and issues raised thereafter in the petition for certiorari to the circuit court.

[1] As previously stated, the Distributors did not assert their "commerce clause" and "equal protection" claims in the original petition for certiorari to the circuit court. Thus, under this court's interpretation of our rule of review under Title 22, section 226, we decline to consider these two contentions for the first time on this appeal.

[2] We note that Title 7, section 1072, Code of Alabama 1940 (§ 6-6-640, Code 1975), which governs the procedure for amending petitions for certiorari, states, in pertinent part, the following:

> ". . . any of the pleadings in such proceedings may be amended as often as occasion may require to attain the ends of justice, and by striking out parties and adding new parties; and upon the issues thus presented, the court shall award the relief, if any,

to which the petitioner is entitled." This statute pertains only to amendments while the "proceedings are in progress" and not to amendments after judgment. "Ex parte Hennies", 33 Ala. App. 229, 34 So.2d 17 (1947).

[3] Although we specifically decline to consider the merits of the Distributors' constitutional challenges to Order 2-76 based upon alleged "commerce clause" and "equal protection" violations, this cause must nevertheless be remanded to the circuit court for its consideration of a single issue--the Distributors' "due process" claim. We reach this result because the Distributors raised this constitutional claim in the original petition for certiorari. When the circuit court ruled that Order 2-76 was invalid, it did not need to address the "due process" issue because it held that "Dark's Dairy" was controlling. Upon review, this court did not address the alleged "due process" violation nor did we remand to the circuit court for its consideration thereof. We therefore believe this cause must be remanded now for a consideration by the circuit court of the merits of the Distributors' federal and state "due process" claim because this issue, though properly presented,

has never been ruled upon by either the circuit court or this court.

[4] The final contention made by the Distributors on this appeal, that the circuit court order of June 28, 1976, continuing the escrow fund arrangement created by that court on February 23, 1976, was null and void, is without merit.

> "In "Barran v. Roden", 263 Ala. 305, 307, 82 So.2d 398, 399 (1955), this Court set out a limitation on the rule that, after an appeal is taken, the trial court cannot rule on any matter involving the appeal:
>
> '. . . The rule is stated to be that after an appeal is taken, the lower court may proceed in matters which are entirely collateral to that part of the case which is taken up (by the appeal) but it can do nothing in respect to any matter or question which is involved in the appeal, and which may be adjudged by the appellate court.' This is a limitation on the rule that after an appeal is taken the trial court cannot, pending that appeal, pass upon any matter involved on the appeal . . ..

> 'As to those matters which are entirely collateral to the questions involved on appeal, the court and parties are free to proceed nothwithstanding the appeal if taken, or without affecting the right to appeal if not then taken. 4 C.J.S. Appeal and Error § 212e, p. 401.'
>
> "Accord: "Francis v. Scott, 260 Ala. 590, 72 So.2d 93 (1954); Ex Parte Taylor", 251 Ala. 387, 37 So.2d 656 (1948); "Ex Parte City Council of Montgomery", 114 Ala. 115, 14 So. 365 (1896)."

"Osborn v. Riley", 331 So.2d 268, 271 (Ala. 1976).

Accordingly, this cause is remanded to the circuit court for a consideration of the Distributors' claim that Order 2-76 violates the Due Process Clause of the federal constitution and similar provisions of the state constitution.

REMANDED WITH DIRECTIONS

TORBERT, C. J., and BLOODWORTH, FAULKNER, JONES and ALMON, JJ., concur.

MADDOX, J., with whom SHORES and BEATTY, JJ., join dissents.

EMBRY, J., dissents.

MADDOX, Justice (dissenting).

On the original appeal of this case, "Ala Dairy Com'n vs. Delview Meadow Gold, etc.", Ala., 345 So.2d 378 (1977), Delview spent several pages of its brief arguing that the trial court's order invalidating Order No. 2-76 was correct because "[a] state regulatory agency is prohibited from erecting trade barriers which are clearly a burden on interstate commerce between the several states."

On application for rehearing, Delview argued:

> "NUMEROUS LEGAL AND CONSTITUTIONAL ERRORS IN PER CURIAM OPINION
>
> "At the very outset, the per curiam opinion rendered herein permits Order 2-76 of the Alabama Dairy Commission to discriminate against the interstate sale of out-of-state powdered milk to milk distributors in Alabama in violation of the Commerce Clause of the United States Constitution, Article 1, § 10, clause 2 and § 8, clause 3. The per curiam opinion is also contrary to the statutory and case law of Alabama and is contrary to the principles of law enunciated in cases from the Supreme Courts of the States of North Carolina, Florida, Delaware, Pennsyl-

vania, New Jersey, Mississippi, Montana, Kentucky, Arizona and Colorado. The per curiam opinion is also expressly contrary to the decisions of the United States Supreme Court in "Baldwin v. Seelig", 294 U.S. 511, 55 S.Ct. 497, 79 L.Ed. 1032; "Hood v. DuMond", 336 U.S. [525] 527, 69 S.Ct. 657, 93 L.Ed. 864 [865] "Dean Milk Co. v. City of Madison, Wisconsin", 340 U.S. 349, 71 S.Ct. 295, 95 L.Ed. 329; "Polar Ice Cream and Creamery Co. v. Andrews", 375 U.S. 361, 84 S.Ct. 378, 11 L.Ed.2d 389; and "Lehigh Valley Cooperative Farmers, Inc. v. United States", 370 U.S. 76, 82 S.Ct. 1168, 8 L.Ed.2d 345.

[383 So.2d 516]

"The per curiam opinion would also permit a violation of Appellees' constitutional rights under the due process clauses of the Constitutions of Alabama and the United States. "Arcadia Dairy Farms, Inc.", 289 N.C. 456, 223 S.E.2d 323.

ORDER 2-76 VIOLATES THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION

"Although the constitutional question concerning violation of the Commerce

Clause by Order 2-76 was thoroughly argued in briefs, discussed in detail with the Court on oral argument, "and submitted as an issue in this case", the per curiam opinion fails to mention the Commerce Clause or even attempt to distinguish this case from the foregoing decisions of the united States Supreme Court and the highest Courts of ten sister states. . . ." [Emphasis added.]

I am of the opinion that arguments on the Federal constitutional question were initially considered, but unfortunately, as it turns out were not addressed by this Court in the original opinion. In other words, I am of the opinion that the Federal constitutional claim, even though not written to, was an issue in the original appeal and was decided adverse to Delview. Therefore, I naturally dissent.

SHORES and BEATTY, JJ., concur

AFTER REMAND

FAULKNER, Justice.

Order 2-76 of the Alabama Dairy Commission (the buttermilk regulation") is before us again. Delview Meadow Gold appeals from an order of the Circuit Court of Montgomery County which held that Order 2-76 did not violate the due process provisions of

the United States and Alabama Constitutions. We reverse.

On June 30, 1978, this case was remanded to the Circuit Court with directions that the court consider the claim made by Delview Meadow Gold and other distributors of dairy products that Order 2-76 of the Alabama Dairy Commission (ADC) violated the due process clause of the United States Constitution and similar provisions in the Alabama Constitution of 1901. "Delview Meadow Gold Division Beatrice Foods Co. et al. v. Alabama Dairy Commission", 383 So.2d 511 (Ala. 1978). The Circuit Court delayed the hearing and ruling in this case until the United States Court of Appeals for the Fifth Circuit rendered its decision in "Dairymen, Inc. v. Alabama Dairy Commission, 584 F.2d 707 (1978), where it held Alabama's milk quota regulations in ADC Order 3-75-1, to which Order 2-76 is an amendment, unconstitutional since those regulations conflict with the commerce clause of the Constitution. On March 12, 1979, the lower court issued a decree holding that ADC Order 2-76 did not violate the due process provisions of the United States and Alabama Constitutions.

Simply stated, Order 2-76 requires that if a milk distributor receives surplus milk (Class II milk) from the farmer-producer, the

distributor may choose to use it in making buttermilk or not, but if he makes and sells buttermilk made from milk powder, he must pay for an equivalent portion of the surplus milk just as though such surplus milk had been used in making the buttermilk; that is, at the Class I price.[1] A carryover provision

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1. Class 1 milk prices, fluid milk prices, are higher than Class II milk prices, the prices paid for surplus milk. Class I milk or fluid milk includes all homogenized milk, pasteurized milk, premium milk, low fat milk, skim milk, buttermilk, chocolate milk flavored milk and milk drinks, buttermilk produced from non-fat milk powder, and shrinkage, excluding swill returns, which exceed 2% if milk is received on farm weights or 1 1/2% if milk is received on other than farm weights. Class II milk includes milk used in the plant for cottage cheese, soft serve mixes, sour cream, yogurt, dips, dressing, shrinkage, swill returns, dumpage, fluid cream products containing 10% or more butterfat, and milk delivered to non-Grade A. plants.

allows the farmer-producer, when he has not shipped surplus milk equal to his share of the distributor's sale of buttermilk made from milk powder, to receive a credit which can be carried until he actually ships surplus milk.

[383 So.2d 517]

The distributors contend that Order 2-76 deprives them of their property without due process of law by requiring them to make compensatory payments to milk producers "for surplus milk" they never actually use in making buttermilk. They also argue that Order 2-76 should be held unconstitutional and void since it is merely an amendment to Order 3-75-1, determined to be unconstitutional by the United States Court of Appeals.

[5] A state may not act to deprive any person of his property without due process of law. "U.S. Const. amend. XIV; Ala. Const." art. 1 § 6. ADC Order 2-76, however, deprives distributors of their property, money, in a manner that is arbitrary and unreasonable. The distributors' money is taken by the ADC to be paid to producers for milk presently or subsequently received but never used in making the buttermilk. Although the money taken is designed as "compensatory payments" such payments are effectively a tax or penalty for

the benefit of the producers on the distributors for their use of milk powder. Other courts have recognized that payments labeled compensatory may be more accurately described as penalties on milk distributors. See, "Kass v. Brannan", 196 F.2d 791 (2d Cir. 1951). The ADC by this penalty arbitrarily and unreasonably discriminates against a legitimate production process.

In "Appeal of Arcadia Dairy Farms, Inc.", 289 N.C. 456, 223 S.E.2d 323 (1976), the Supreme Court of North Carolina in considering the North Carolina Milk Commission's amendment to Milk Marketing Order No. 2, requiring distributors reconstituting milk for Class I sales to pay to producers selling milk to other distributors in the market area an amount equal to the difference between the Class I and normal Class II prices, stated:

> "To interpret GS 106266.8 [the amendment] as conferring upon the Commission power to require a distributor of 'reconstituted' milk to make such payments for the benefit of producers, with whom it has no dealings, would also give rise to serious doubt as to whether such exaction would be a violation of Article I, § 19, of the Constitution of North Carolina, which provides, 'No person shall be. . . in any manner de-

prived of his . . . property, but by the law of the land.'"

[6] The ADC lacked authority under Title 22, § 223(1), Code of Alabama (Recomp. 1958) (as amended) to promulgate an order that in effect requires distributors to pay the premium Class I price for milk not used in a premium product. See Code 1975, §§ 2-13-50 and 51. The distributors will have to pay the Class I price for milk whenever they make buttermilk from milk powder irrespective of whether they do so for greater profit, convenience, because no fresh milk is available or only sporadically. The milk that they are required to purchase for premium prices, even though it is not used in making buttermilk, is actually milk which is produced in excess of what is needed for fluid milk consumption and thus should come under the lower minimum price, Class II price. Whether the ADC computes the amount of milk for which the distributors pay the Class I price, the fluid milk price, on the basis of any one of the three methods allowed by the statute, Order 2-76 is still arbitrary and unreasonable and thus violates the due process provisions of the Constitution of the United States and the Constitution of Alabama 1901.

[7] We hold that the unconstitutionality of Order 2-76 relates back to the date of its adoption--not from the date of this decision.

REVERSED AND RENDERED.

TORBERT, C. J., and BLOODWORTH and JONES, JJ., concur.

SHORES and BEATTY, JJ., concur in the result.

MADDOX, EMBRY and ALMON, dissent.

SHORES, Justice (concurring in the result).

I concur in the result only because I think we are bound, at least by principles of comity, to follow the U. S. Fifth Circuit Court of

[383 So.2d 518]

Appeals' view of the federal constitutionality of the involved regulations.

BEATTY, J., concurs.

MADDOX, Justice (dissenting).

This case, involving Pricing Order 2-76 has had a long and tortuous journey. The facts are sufficiently set out in an opinion, which I authored, in "Alabama Dairy Commission v. Delview Meadow Gold", 345 So.2d 278 (Ala. 1977). Joining me then were Chief Justice Torbert, Justices Almon, Shores,

Embry and Beatty. Justice Jones concurred in the result, and Justices Bloodworth and Faulkner, dissented. On that appeal, a majority of this Court upheld the Order 2-76, and as I expressed in a dissenting opinion, on June 30, 1978, all the constitutional claims advanced by the distributors on that first appeal were submitted and decided adverse to them; nevertheless, a majority (5-4) of this Court allowed the distributors to litigate again in the circuit court what they dubbed a "due process" claim. I must respectfully point out that the "due process" issue was presented by the distributors in their original petition for certiorari in the circuit court wherein they sought review of Order 2-76, and I must further point out that the constitutional issue was extensively argued in brief on the first appeal in this case.

While the matter was pending before the circuit court an entirely different action was proceeding through the Federal District Court, which culminated in a decision by the Fifth Circuit Court of Appeals that Alabama Dairy Commission Order 3-75-1, to which Order 2-76 was an amendment, was unconstitutional as violative of the interstate commerce clause. "Dairymen, Inc. v. Alabama

Dairy Commission", 584 F.2d 707 (5th Cir. 1978). As I understand it, the Dairy Commission no longer enforces that order; nevertheless, the result reached today will determine who is entitled to more than 2 million dollars involved in Order 2-76.

The circuit court found that, irrespective of the decision in "Dairymen v. Alabama Dairy Commission, supra", the distributor's "due process" claim was not meritorious. I think that the circuit court was correct. I personally think that the Fifth Circuit decision is in error, because I do not believe it follows prior decisions of the Supreme Court of the United States in milk regulation matters; nevertheless, even assuming the correctness of the Fifth Circuit decision, I do not believe that Order 2-76 would be invalid. In short, I think that the trial judge could have found that the purpose and goal of Order 2-76 was employed, not solely for the economic well-being of producers, but was designed also for consumer protection, in that, unregulated sales of buttermilk made from powder would be destructive by reason of the potential disturbance of the balanced distribution structure in Alabama built up during years of regulation. The uncontradicted testimony was that Alabama

was a "deficit" milk producing state, and that failure to regulate the distribution and sale of buttermilk made from powder would aggravate this situation. Unless "Nebbia v. New York", 291 U.S. 502, 54 S.Ct. 505, 78 L.Ed. 940 (1934), has been overruled, I thought a state could guarantee a fresh, wholesome supply of milk--a legitimate consumer interest.

"Due process" means fundamental fairness. Under Order 2-76, the distributors were not forced to buy milk they did not need, they were only required to pay a higher price for Class II milk if they bought and used powder, based upon the amount of buttermilk made from powder. I think it only incidental that the powder came across state lines. Order 2-76 would have required the same procedure for powder purchased in Alabama. In short, I see no conscious attempt to burden interstate commerce.

Under Order 2-76, the distributors were allowed a "regulated" price for the buttermilk which the distributors made from powder; therefore, they received an economic advantage of buying powder at a cheaper price and getting a "higher regulated price" from the consumer. Using a balancing approach, I would uphold the trial judge's finding that the "due

process" clause was not vio-

[383 So.2d 519]

lated. In "Great Atlantic and Pacific Tea Co., Inc. v. Cottrell", 424 U.S. 366, 96 S.Ct. 923, 47 L.3d.2d 55 (1976), the Supreme Court stated that where the purpose and goal of the restriction employed is consumer protection and not the economic well-being of the present milk industry, and the means chosen do not involve an attempt to control commerce in another state or otherwise to produce an extraterritorial effect, and does not operate to discriminate against or place an embargo on interstate commerce, the obvious local interest at stake outweighs whatever national interest there might be in the prevention of the state restrictions having an incidental impact on interstate commerce. Furthermore, I do not find that Order 2-76 is substantially different in its effect from milk orders issued by other states or by the federal government dealing with buttermilk. I do not find that it is unfair to the distributors. Consequently, I respectfully dissent.

EMBRY, J., concurs.

APPENDIX "B"

REPRINTED FROM
ALABAMA DAIRY COMMISSION v.
DELVIEW MEADOW GOLD, Ala.,
345 So.2d 278 (1977)

ALABAMA DAIRY COMMISSION, and
Associated Milk Producers, Inc.

v.

DELVIEW MEADOW GOLD DIVISION,
BEATRICE FOODS COMPANY, et al.

SC 1814.

Supreme Court of Alabama.

April 15, 1977.

Rehearing Denied May 20, 1977.

[345 So.2d 278]

In a suit instituted by petition for certiorari to review an order of the State Dairy Commission, the Circuit Court, Montgomery County, William F. Thetford, J., invalidated the order. The Commission and an intervenor appealed. The Supreme Court held that factual findings were supported by the record and justified classification and pricing action taken by the Commission in permitting producers to share in profits made by distributors on their sales of buttermilk made from milk powder.

Reversed and remanded.

Jones, J., filed an opinion concurring in result.

Faulkner, J., dissented and filed opinion in which Bloodworth, J., concurred.

(Headnotes deleted)

PER CURIAM.

This appeal involves an order of the Alabama Dairy Commission which permits producers to share in the profits of sales of buttermilk made from milk powder.

Succinctly stated, Order 2-76 required that if a distributor receives surplus milk from the farmer, the distributor can use it in making buttermilk or not as he sees fit, but if he sells milk made from powder, he must pay for an equivalent portion of the farmer's surplus milk as "though" such surplus milk had been used to make the buttermilk, that is, at the Class I price.

In order to compensate the distributor, in part, for this increased cost of manufacturing buttermilk from powder, the Commission increased the wholesale price of buttermilk, whether made form powder or fresh skim milk. In other words, the Commission continues to "regulate" the price of buttermilk whether made from powder or fresh skim milk. An example of how the Commission order would

work is, as follows: Assume that during the month of June, a farmer ships 1,000 pounds of milk to a distributor. At the end of the month, the farmer's pro rata share of the distributor's sales are as follows: 600 pounds of the farmer's milk was used to make homogen-

[345 So. 2d 279]

ized milk (Class I) and 400 pounds was used to make yogurt, or was resold to a cheese manufacturer (Class II). The distributor's records also show that it sold 300 pounds of buttermilk made from powdered milk. Under the old pricing structure, the farmers would have received the Class I price for 600 pounds of milk, and the Class II price for 400 pounds of milk. The distributor would have paid the farmer nothing from its buttermilk sales and would have realized the entire profit, which the record before the Commission shows was considerable because the raw product cost of powder was "unregulated" but the sales price of buttermilk made from powder "was regulated". Under the new regulation, the farmer gets to share in this profit. He would be paid for 900 pounds of milk at the Class I price, and 100 pounds of milk at the Class II price. The extra cost to the distributor is the difference between

the Class I and Class II prices. In order to compensate the distributor for this increased cost, the Commission increased the wholesale price which he may charge the retailer.

Under the order, the farmer gets the Class I price for the distributor's buttermilk sales "only" if the farmer "at some point" ships an equivalent amount of milk. The regulation does have a "carryover" provision, strenuously objected to by the distributors, which operates as follows: If a farmer has not shipped "surplus" milk equal to his share of the plant's sales of buttermilk made from powder, he does not get paid for such share. However, he gets a "credit" which may be carried forward to succeeding months. If the farmer later ships "surplus" milk to the plant "equal" to his credited share of earlier sales of buttermilk made from powder, he gets the Class I price for this milk. The farmer never gets paid for milk he does not deliver, but under the "carryover" provisions, it is possible for a distributor's buttermilk sales to give rise to a Class I price for "surplus" milk which was not delivered until after the month in which the buttermilk sales occurred.

Distributors, unhappy with Order 2-76

asked the Circuit Court of Montgomery County to review it. The court, citing this Court's case of "Dark's Dairy v. Alabama State Milk Control Board", 278 Ala. 693, 180 So.2d 527 (1965), held it to be invalid, as being beyond the powers of the Commission. The Commission appealed. We reverse.

At first blush, it would seem that "Dark's Dairy" would control this case because "Dark's Dairy", too, involved a classification and pricing order of the old Milk Board involving sales of buttermilk made from powder. However, it is apparent from a close reading of "Dark's Dairy" that this Court did not hold in that case that a milk regulatory commission was powerless, "under all fact situations", to classify and regulate the price of buttermilk made from powder.

In "Dark's Dairy", the producers argued essentially what the Commission argues here, namely:

> "Counsel for the producers argue in support of that portion of Order 1-63 now being considered, that unless the classification of non-fat buttermilk is on the 99% sales basis, a distributor could by reconstituting buttermilk from milk powder and other ingredients diminish his needs for fresh milk for buttermilk

purposes, and thereby increase the amount of surplus milk with a resulting decrease in the blend price paid the producer."

This Court answered that argument, as follows:

"The record is devoid of evidence tending to show what percentage of non-fat or cultured buttermilk is manufactured from fresh milk or what percentage is reconstituted from milk powder and other elements. Without such evidence it must appear that the classification of non-fat buttermilk on the basis of the sales of 99% of all buttermilk, that is that made from fresh milk and that made from powder, etc., can only be deemed as arbitrary. It cannot be determined from the record why the figure was set at 99% of sales, rather than 95%, or 80%, etc."

Here, unlike the situation in "Dark's Dairy, there was substantial evidence presented,

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and based on this evidence, the Dairy Commission made the following findings of fact:

"3. Approximately three-fourths of the buttermilk processed and distributed by licenses of the Commission is made from

non-fat milk powder. In the absence of adequate regulations the sales of fluid buttermilk processed from non-fat milk powder are lost to producers.

"4. The cost of producing buttermilk from non-fat milk powder is less than producing buttermilk from fresh Class I skim milk. This cost difference creates the incentive to produce buttermilk from non-fat milk powder.

"5. Some distributors are producing buttermilk from fresh Class I skim milk and some are producing buttermilk from non-fat milk powder, thus creating a disparity of costs among distributor licenses.

"6. Present wholesale and retail prices for buttermilk do not adequately reflect the cost of producing said buttermilk using fresh Class I skim milk.

"7. Wholesale and retail prices for buttermilk can be adjusted to adequately reflect the cost of producing buttermilk from fresh Class I skim milk and give the consuming public an adequate supply of high quality buttermilk at a fair price.

"8. The use of fresh Class I skim milk in the production of buttermilk will tend to stimulate more production of

milk in Alabama."

[1] These findings are supported by the record and justify the classification and pricing action taken by the Commission, acting pursuant to the authority granted it by Section 20 of Act No. 408, Acts of Alabama, 1971, p. 1097, [carried as Title 22, § 223(1), Code of Alabama, 1940, Recompiled, 1958, (1973 Cumulative Supplement)], which provides, in part:

> "When in the judgment of the dairy commission, it is necessary or advisable, due to seasonable fluctuations or other unstable conditions, in order to promote a proper balance between the supply of and the demand for milk, to fix a lesser minimum price for milk which is produced in excess of what is needed for fluid milk consumption, the dairy commission may establish the quantity of milk for which the distributor or milk dealer shall pay the fluid or base milk price, and may establish a lesser minimum price for milk which is produced in excess of what is needed for fluid milk consumption. For this purpose, the dairy commission may compute said quantity upon a uniform system of plant usage, classifying milk according to its

various usage and establishing different minimum prices which the milk dealer or distributor shall pay for each classification, or the dairy commission may, if it deems it most advisable, establish a base surplus system, placing all milk sold by a plant for fluid milk consumption, including all milk as defined in the definition of fluid milk in one classification, establishing a minimum price therefor and all milk processed by such distributor or milk dealer into by-products into another classification, and fixing a lesser minimum price for said surplus milk so used in the by-products classification, "or the dairy commission may use a combination of both systems." The dairy commission shall have authority to use the different systems of classifications in different milk sheds or different localities of the state as it deems most advisable to carry out the provisions of this chapter. The dairy commission shall have the power to establish uniform rules and regulations for the apportionment of this quota of base milk among the various producers who furnish such distributors and milk dealers with their regular milk

supply used for such purposes, and may adopt such systems for the apportionment of such base or higher price classification of milk among the several producers as it may determine to be the most just and equitable in the administration of this chapter. For this purpose, the dairy commission may require any milk dealer or distributor to supply necessary information about the quantity of milk received from the producers during a specified period of time, and any other information necessary for the determination of this matter. The

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dairy commission may determine the minimum price to be received by producers for milk within the quota of base or higher price classification of milk and for surplus milk or milk in excess of such producers quota. Each order fixing minimum price or handling charges may classify milk for forms, classes, grades, or use as the dairy commission may deem advisable and may specify the minimum price in each classification, grade or use as the dairy commission may determine. [Emphasis added.]"

If Order 2-76 is invalidated, it is reasonable to assume that the previous inequitable and inconsistent pricing system for buttermilk would continue under which a distributor would share a "regulated" wholesale price for buttermilk, whether made from powder or fresh skim milk, but would have an "unregulated" raw product cost, thereby throwing substantial quantities of fresh skim milk into the Class II price, and consequently injuring the producers. Order 2-76 attempted to remedy this inequity and inconsistency, and also attempted to stimulate milk production in Alabama. We find Order 2-76 is reasonable

[2] It is not the duty of the courts to devise the scheme for regulating the fluid milk industry. That job belongs to the Alabama Dairy Commission.

[3] Our duty is to review the orders of the Dairy Commission under the rule of review set out in "Alabama Jersey Cattle Club v. Alabama State Milk Control Board", 274 Ala. 611, 150 So.2d 711 (1963), as follows:

> ". . . (1) Matters for the judicial tribunal are whether the order is unlawful, and what should be the legal conclusion form the facts found. (2) The re-

view by certiorari includes a determination by the circuit court of whether the order is unreasonable based on the facts so found, but not a determination of whether the facts found by the board are true upon a consideration of the evidence. (3) Where there is some evidence on which to base such a finding, this satisfies the rule of review, as contemplated by the statute."

After reviewing Order 2-76 under the rule enunciated in "Alabama Jersey Cattle Club", we are of the opinion that the judgment of the circuit court is due to be reversed.

REVERSED AND REMANDED.

TORBERT, C. J., and MADDOX, ALMON, SHORES, EMBRY and BEATTY, JJ., concur.

JONES, J., concurs in the result.

BLOODWORTH and FAULKNER, JJ., dissent.

JONES, Justice (concurring in the result):

I concur in the result. I agree that "Dark's Dairy" is not controlling in that the evidence lacking in Dark's Dairy has been supplied in the case at bar. But this is not to say that I agree with those conclu-

sionary statements in the majority opinion going to the overall authority of the Commission. In view of pending litigation, contesting on constitutional grounds the Dairy Commission's legal existence, I reserve the expression of any opinion on the Commission's power to exercise any regulatory authority over the dairy industry until these issues are presented in an adversary context. No such constitutional attack is here presented.

FAULKNER, Justice (dissenting).

I dissent.

This case results from the fact that Bossy, the cow, and the consumer cannot get together. At a time when she is producing the most milk, the consumer is drinking it the least. Surpluses, therefore, are created because Bossy cannot be turned off. What to do, and how to compensate the producer for this surplus milk confronted the Commission. From its deliberation, Order No. 2-76 was adopted.

Order No. 2-76 permitted farmers, as well as distributors, to receive a share of the profits from sales of buttermilk made from powder and allowed the distributors

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to recoup most of the increased cost through

an increase in their selling price. Producers are paid for the milk they deliver to a distributor according to the way the distributor uses the milk. Class I milk is sold by the distributor in fluid form and brings a higher price. Class II milk is that which is produced in excess of the Class I needs of the distributor and which, as a surplus, brings a lower price. Under Order No. 2-76 the distributor, if he received surplus milk, can use it in making buttermilk or he can use powder, but if he sells buttermilk made from powder, he must pay for an equivalent portion of the surplus milk as though the surplus milk had been used to make the buttermilk, i.e., at the Class I price. A carry-over provision allows a farmer, when he has not shipped surplus milk equal to his share of the plant's sale of buttermilk made from powder, a credit which can be carried until he does ship surplus milk.

Some distributors, including Delview Meadow Gold, filed a petition for certiorari in the Circuit Court of Montgomery County, asserting that the regulation was beyond the power of the Commission, that it was unreasonable and violated the due process clause of the United States Constitution, and that it

imposed additional costs on them, thereby reducing their profit margin. The petition for certiorari was granted and the lower court invalidated the order as being contrary to "Dark's Dairy v. Ala. Milk Control Bd.", 278 Ala. 693, 180 So.2d 527 (1965). The Alabama Dairy Commission and Associated Milk Producers. Inc., a milk farmer cooperative, appeal this decree.

The issue here is whether the Alabama Dairy Commission in promulgating Order No. 2-76 exceeded its power and authority under Title 22, §§ 205-31, Code of Ala. 1940 (Recomp. 1958) (as amended), invalidating the order.

The Circuit Court found that Order No. 2-76 was contrary to "Dark's Dairy" and thus invalid. I agree with the lower court in holding that "Dark's Dairy" is controlling.

In that case this court considered a Milk Control Board order classifying fat buttermilk on the basis of sales of 99% of all buttermilk rather than on the distributor's usage of fresh milk. Order No. 2-76 is substantially similar to that earlier regulation, as both required distributors to account for sales of buttermilk as premium price sales, regardless of whether the buttermilk was made from fresh milk or powder.

The facts of the two cases are not significantly different. That here the Dairy Commission granted a concomitant price increase to allow the distributors to recoup most of their increased costs resulting from the new regulation, while it did not in "Dark's Dairy", is irrelevant to the question of arbitrariness of the order.

In "Dark's Dairy" this court held that a regulation which results in producers being paid a premium price for milk that is surplus is beyond the power of the Board. Order No. 2-76 would bring the same results and is, therefore, beyond the power of the Commission. It does not matter whether the distributors use powder to make buttermilk all the time or only when there is an insufficient supply of fresh milk; the distributors will have to pay a Class I price for milk whenever they make their buttermilk from powder, for whatever reason, whether greater profit, convenience or necessity. This violates § 223(1) which states in pertinent part:

> "When in the judgment of the dairy commission, it is necessary or advisable, due to seasonable fluctuations or other unstable conditions, in order to promote a proper balance between the supply of

and the demand for milk, to fix a lesser minimum price for milk which is produced in excess of what is needed for fluid milk consumption, the dairy commission may establish the quantity of milk for which the distributor or milk dealer shall pay the fluid or base milk price, and may establish a lesser minimum price for milk which is produced in excess of what is needed for fluid milk consumption. For this purpose, the dairy commission may compute said quantity upon a uniform system of "plant usage", classifying milk

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according to its various usage and establishing different minimum prices which the milk dealer or distributor shall pay for each classification, or the dairy commision may, if it deems it most advisable, establish a base surplus system, placing "all milk sold by a plant" for fluid milk consumption, including all milk as defined in the definition of fluid milk in one classification, establishing a minimum price therefor and all milk processed by such distributor or milk dealer into by-products into another classification, and fixing

a lesser minimum price for said surplus milk so used in the by-products classification, "or the dairy commission may use a combination of both systems." (Emphasis added.)

The milk which the buttermilk distributor must buy under Order No. 2-76 is milk which is produced in excess of what is needed for fluid milk consumption and is thus due to come under the lesser minimum price, not the premium price. Whether the Commission computes the quantity of milk for which the distributor pays the fluid milk price upon a plant usage system, a plant sales system or a combination of both, Order No. 2-76 is arbitrary and unreasonable. The milk which the powder buttermilk distributors are required to purchase is neither used nor sold by the plant for fluid milk consumption but is nevertheless priced as such. The Commission lacks authority to pass an order that in effect makes distributors pay a premium price for milk not used in a premium product.

None of the arguments made by the Dairy Commission are sufficient to overrule "Dark's Dairy". Therefore, the Circuit Court properly decided this case on the basis of "Dark's Dairy".

I would affirm the trial court.

BLOODWORTH, J., concurs.